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HAROLD B. WILLEY,

In the

Supreme Court of the United States

October Term, 1955

No. 465

Ira S. Bushey & Sons, Inc., Employer, and The State Insurance Fund, Insurance Carrier,

Petitioners,

—v.—

Frank A. Cardillo, Deputy Commissioner, Second Compensation District, Thorleif Johansen, Claimant, American Policyholders' Insurance Company and/or American Mutual Liability Insurance Company and Hartford Accident & Indemnity Company, Insurance Carriers,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, IRA S. BUSHEY & SONS, INC., AND AMERICAN POLICYHOLDERS INSURANCE COMPANY AND/OR AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, IN OPPOSITION

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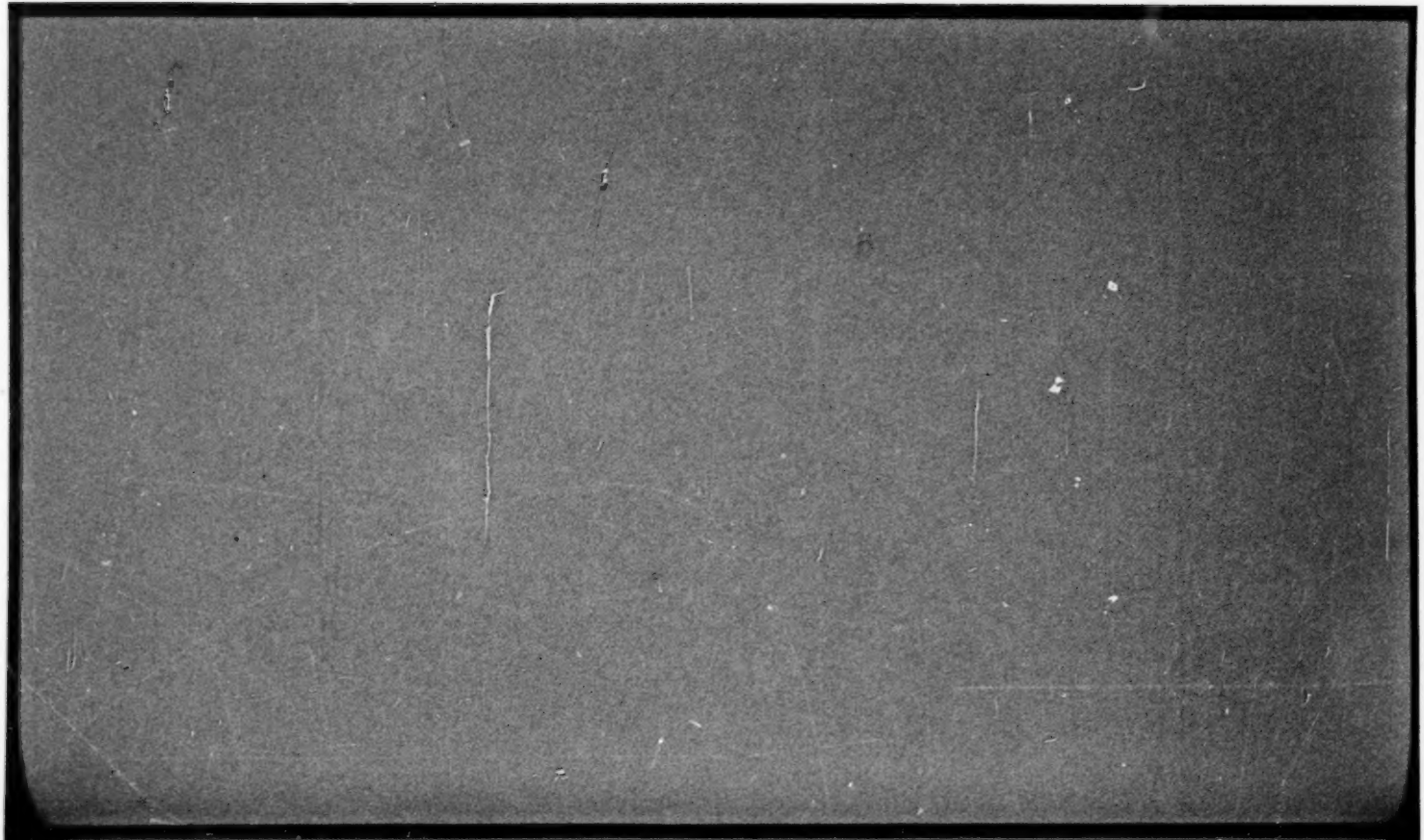

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Opinions Below

The opinion of the United States District Court for the Eastern District of New York is unreported. It is found at pages 30a to 33a of the Record in the Court below. The opinion of the United States Court of Appeals for the Second Circuit is reported at 225 F. 2d 137.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

The petitioner has set forth 3 questions for consideration of the Court. The respondents who are submitting this brief in opposition to the petition have no quarrel with the first 2 questions presented. They do take issue with the propriety of Question 3. It will be shown hereinafter that the petitioner (a) raised no question of constitutionality in the Courts below, (b) presented no proof on that question and (c) that the decisions of the Courts below project no question of constitutionality.

Statute Involved

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 33 U. S. C. §901 *et seq.*) are set forth in the Petition, Appendix A., pages 20-21.

Statement

For all practical purposes the outline of the facts set forth by the petitioner is correct. The petitioner, State Insurance Fund, has stated in its petition that the testimony of the claimant's (Johansen's) doctor was that the hearing loss existed prior to the State Insurance Fund becoming

the insurer of Ira S. Bushey & Sons, Inc. We think the entire medical proof in this record is much more fairly evaluated by Medina, *C.J.*, writing for an unanimous Court below, in the following excerpt from the decision of said Court (p. 144 of 225 F. 2d):

> "The nature of occupational diseases and the dearth of medical certainty with respect to the time that is required for them to develop and the permanence and extent of the resultant injurious effects at different stages of the diseases' evolution, make it exceedingly difficult, if not practically impossible, to correlate the progression of the disease with specific points in time or specific industrial experiences."

Argument

The office of this brief is to demonstrate to the Court that no constitutional question is projected by Reason III (pp. 14-19 of Petition). Reasons I and II (pp. 5-14 of Petition) concern themselves with the construction of the statute here involved in so far as it has been held that the compensation claim is compensable.

The petitioner has not shown any conflict of decision respecting that subject because the instant decision is the only appellate decision dealing with the particular Act here involved.

Other than having stated in conclusionary language that questions 1 and 2 are important questions of law for this Court to determine, the petitioner, State Insurance Fund, has not shown factually how this is so.

Having failed to factually demonstrate that any of the considerations, set forth in Rule 19 of this Court, exist in

this matter, the petitioner, State Insurance Fund, seeks, in its argument respecting the apportionment of liability among the insurance carriers, involved in this matter (Reason III, pp. 14-19 of Petition), to inject a constitutional question into the case. It attempts to do this by using the general and all embracing language that the decision below "is an invasion of the right to private property, the cancellation and annulment of the right to contract and is not only illegal *per se* but unconstitutional."

Well, to begin with, the petitioner, State Insurance Fund, never raised any constitutional questions in either of the Courts below.

Second, the Court below neither cancelled nor annulled its *right* to contract.

Third, the Court below did not invade its right to private property. There was no *property* which was involved or invaded. The Court below merely construed the Act here involved to hold the "last employer" liable (which was Ira S. Bushey & Sons, for whom the claimant worked *continuously* for 11 years) and by a parity of reasoning held the insurance carrier liable who last insured that "liable" employer. In arriving at that conclusion the Court said (p. 145 of 225 F. 2d):

> "If administrative ease of handling was a consideration of significance in the formulation of the Act with reference to the liability of the employer, then there is small reason to suppose that it was the intention of the Congress to inject into the determination of carrier liability the very same conjectural and unsatisfactory estimates which would have been involved in attempting to apportion liability among employers."

* * * * *

> "* * * Rather, it would seem far more in keeping with the Congressional recognition of the over-riding importance of efficient administration in this area, to conclude that the treatment of carrier liability was intended to be handled in the same manner as employer liability, and that the carrier who last insured the 'liable' employer during claimant's tenure of employment, prior to the date claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be held responsible for the discharge of the duties and obligations of the 'liable' employer. We so hold."

The Court below never violated the express provisions of the insurance contract. *The insurance contract was never before the Court below, the District Court, or the administrative tribunal.*

Had it been before any of those tribunals, it would have made no difference in this matter. The tribunals were called upon to *construe and interpret the Act here involved*, not an insurance contract which was never before them. The administrative tribunal and the Courts below were, *inter alia*, called upon to determine what the Congress intended with respect to a determination of carrier liability where the statute was silent on that subject.

The Court below, we submit, reasoned properly as to Congressional intention respecting carrier liability.

The petitioner, State Insurance Fund, would have this Court believe that the result as to carrier liability, which the Court below arrived at, is bizarre and completely unheard of. Completely overlooked, and we assume inadvertently, is that the N. Y. Workmen's Compensation Act, upon which the Act here involved was concededly modeled, is entirely silent as to carrier responsibility where there is

(a) *one* employer, in whose employment the claimant is exposed to an occupational disease, and (b) several carriers covering said employer. Administrative practice under the New York statute, which, we submit, should reinforce the decision of the Court below (*Lawson* v. *Suwanee Fruit & Steamship Co.*, 336 U. S. 198, 205, 69 S. Ct. 503, 506), results in the carrier who last insured the employer in a *one* employer case being held solely liable.

Clarke v. *Rochester Folding Box Co.*, 283 App. Div. 1126;
Russo v. *Despatch Shops, Inc.*, 280 App. Div. 1008 (an occupational loss of hearing case);
Lane v. *Daystrom Corporation*, 276 App. Div. 247;
Lanzetta v. *Allied Decorating Co.*, 287 N. Y. 570;
Trimboli v. *Ford Instrument Co.*, 271 App. Div. 854.

The only obligation which the petitioner, State Insurance Fund, had under its policy, which has never been before any tribunal for construction and which, as has been stated heretofore, plays no part in this case, is to pay promptly to any person entitled thereto the amount awarded to him under the compensation law. There is no provision in its policy, which is the standard form of policy, which remotely refers to other carriers who might have insured the particular risk before State Insurance Fund wrote its policy.

Placed in a crucible of analysis, the whole argument State Insurance Fund makes on the subject of carrier liability is that the Court below was wrong in its holding. To make it attractive to this Court for certiorari purposes, it dresses up its argument under Reason III with mystical raiments of constitutionality. Denuded of its unbecoming and inappropriate garb, petitioners' straw man falls because of legal malnutrition.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied to which end this brief is

Respectfully submitted,

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November 9, 1955

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BRIEF FOR THE RESPONDENT IN OPPOSITION

The opinion of the District Court, printed in the Record of the court below, at pages 30a-33a, is unreported. The opinion of the United States Court of Appeals for the Second Circuit, is reported in 225 Fed. Reporter 2nd 137. Also appears in Appendix B annexed to the Petition at pages 24-39 incl.

Jurisdiction

Judgment of the United States Court of Appeals for the Second Circuit was entered on July 19, 1955, Appendix C, pages 40-41 incl. Jurisdiction of this Court is invoked by Petitioner, State Insurance Fund. under U.S.C. 1254 (1); the Statute involved is the Longshoremen's and Harbor Worker's Compensation Act 33 U. S. C. Sections 901, *et seq.*

Question Presented in Opposition

1. Whether, under the Longshoremen's and Harbor Worker's Compensation Act the compensation carrier, the State Insurance Fund, which last insured the employer, was properly held solely responsible for the employer's discharge of duties and obligations under the said act?

Statute Involved

The statutory provisions involved are in the Longshoremen's and Harbor Worker's Compensation Act of March 4, 1927, 44 Stat 1424, 33 U.S.C. 902 Pars. 2, 10; 33 U.S.C. 903 (a); 908 (c) 13; 908 (c); 21, 33 U.S.C. 935-938 incl.

Statement

Although the employer, Ira S. Bushey & Sons, Inc., is named by the State Insurance Fund as a co-petitioner, it is, in fact, merely a formal but not an actual applicant herein. This is because the employer (as distinguished from its successive insurance carriers) does not deny its liability to the employee, Thorleif Johansen. The question whether the award determining such liability should be based upon Section 908(c) 13, by way of a schedule award or 908 (c) 21, providing for a non-schedule award, as de-

termined on the appeal to the United States Court of Appeals does not survive for further review by the United States Supreme Court either on appeal or by way of Certiorari.

Further: the question whether the liability for the payment of any award made to the respondent, Thorleif Johansen, should be laid solely upon the State Insurance Fund, the last insurance carrier, or apportioned among the several insurance carriers or placed "jointly, severally and equally" upon the successive insurance carriers as set out in the Deputy Commissioner's award, does not present a reviewable issue, as contended by petitioner, State Insurance Fund.

This is the position taken herein by the Hartford Accident & Indemnity Company, one of the several successive insurers of the employer vis-a-vis the State Insurance Fund, the actual petitioner on this application.

Statement of Facts

There is no dispute as to the essential facts in this case. Claimant, Thorleif Johansen, was, with the exception of two periods, not material herein, an employee of Ira S. Bushey & Sons, Inc., from April, 1930 to the date of the award. He was employed as an iron worker, ship fitter and ship carpenter, in the repair of vessels. In the course of his employment he was continuously exposed to loud and excessive noises. In December, 1952 he first noticed recurrent episodes of buzzing and ringing in his ears. In 1953 he became aware of a loss of hearing, which, subsequently, he was informed by an ear specialist, was permanent and was due to his employment. On October 5, 1953 he filed a claim for compensation benefits under the Longshoremen's and Harbor Worker's Compensation Act and subsequently a schedule award for permanent partial

disability, under Section 905 (c) 13, equivalent to 13.8% binaural loss of hearing for 27.6 weeks at the maximum rate of $35.00 per week was made to him.

The award was made by the Deputy Commissioner against Ira S. Bushey & Sons, Inc., the employer, and its three successive insurance carriers. The carriers were held "jointly, severally and equally liable". The decision of the Deputy Commissioner thus awarding compensation was in all respects affirmed on appeal to the United States District Court, Eastern District of New York (District Judge Inch). On further appeal to the United States District Court of Appeals, the Order of Affirmance entered in the District Court was reversed and the matter remanded to the District Court with directions to modify the Order in the instant and the companion case (claim of *Todd Shipyards* v. *Raymond Lebowitz*), by holding the State Insurance Fund "last carrier" solely responsible, together with the employer, and discharging the Hartford Accident & Indemnity Company and another prior insurance carrier from liability.

ARGUMENT

The State Insurance Fund, referred to as "last carrier", was properly held solely responsible for the employer's discharge of duties and obligations under the Longshoremen's and Harbor Worker's Compensation Act.

In arguing for the issuance of a writ of certiorari, the State Insurance Fund contends that the decision of the Court of Appeals, discharging the earlier insurance carriers and holding it as the "last carrier" solely liable for the payment of the entire award, constituted an illegal interference with the contractual liability existing between the parties. That this is erroneous is readily shown.

Petitioner correctly states that its liability for the employer's discharge of the employer's obligation to its employees under the Longshoremen's and Harbor Worker's Compensation Act is determined by the period fixed in the contract. Thus, as to liabilities actually incurred and for which claim has already been made prior to the inception of the petitioner's policy, petitioner could not be held responsible. This is clearly the contracted responsibility of the insurance carrier on the risk at the time when proceedings to establish such liability were initiated. But when a disability develops gradually, within the coverage period of successive insurers and has not been brought into the field of controversy previous to the effective date of the last insurance carrier's policy, the rule is otherwise. This is so, even where the disabling condition first manifests itself after the inception of the last carrier's policy. Absent either a specific provision in the insurance contract or express statutory mandate, such previously existing liability is not excluded from the coverage afforded by the successor insurance company's policy. What the petitioner herein, State Insurance Fund, really seeks is to rewrite the statute as well as its policy and to exclude from coverage all pre-existing disability for which no claim for compensation benefits was made until after the insurance policy of the State Insurance Fund first became effective.

We are not dealing here with an ordinary contract of insurance. In such case the law and public policy grants to the contracting parties great latitude of operation. We are dealing here with an insurance policy framed to meet the express provisions of the statute, namely substitution of the insurance carrier for the employer (Section 936-938). The statute provides, merely for security for the payment of the compensation benefits awarded the injured employee, but no change, modification or lessening of the employer's liability to his employee is contemplated or permitted. Therefore, precisely as pre-existing disease or infirmity

of the employee does not disqualify a claim from "arising out of and in the course of the employment" requirement, if the employment aggravated the disability for which compensation is sought, so also liability attaches to the policy of the insurance carrier in force when the claim for such benefits is first made.

See:

Pittstown Stevedore Corp. v. *Willard,* 92 F. Supp. 89;

Brown-Pacific Marvin Co. v. *Cardillo,* 91 F. Supp. 968.

Again, petitioner complains that to place the entire compensation award to the injured employee upon the last carrier instead of apportioning the same among previous insurance carriers, results in hardship and inequity. Here again petitioner asks the court to provide for the distribution of the loss where the statute, under which the liability arises, is itself silent as to such relief. While in individual cases an inequity may result, this is insufficient reaon for intervention by the court and a rewriting of express statutory enactment as well as over-riding the public policy written into the law by the Congress and for which no independent provision is made in the insurance policy itself. A brief survey of insurance law, particularly that relating to workmen's compensation, will show clearly that what petitioner is seeking represents, at best, a very recent innovation, adopted by a few individual states under statutory provisions and generally limited to claims arising under so called "occupational disease". In most instances the courts will not inquire as to the time when the underlying condition which now has developed into an actual justicable controversy, first arose.

It may, therefore, be broadly said that in the field of workmen's compensation law, precisely as in all other fields of legal liability, the courts regard only the imme-

diate and not the remote cause and lay responsibility for compensating such ensuing injury or damage accordingly. Larsen, in his work on "Workmen's Compensation Law, Section 95.30, *Apportionment Between Insurers*", found the rule requiring a single insurance carrier to assume the entire cost of any single injury, harsh. Nevertheless, the learned author points out that, absent successive "accidents", one occurring prior to the assumption of the risk and one during the risk period of the last carrier, imposing the entire loss on such last carrier was, nevertheless, in conformity with general law. Procedure, apportioning liability for a progressively developing condition between successive carriers, unless directly provided for in the Compensation Act, must be found, if at all, under general law and established by separate and independent proceedings.

Here the petitioner complains that the existing statute has not provided for such procedure; that the Court of Appeals has recognized and given force to this lack of statutory authority. It now asks, that on final review this be written into both the statute and the insurance contract by this court. Merely to state the proposition is to show why it should be rejected.

The Court of Appeals clearly recognized this. In the course of its opinion the court said:

> "During the course of the hearings which preceded the passage of the Act, an employer representative suggested that the Act should contain a provision limiting the proportion of the total award for which a particular employer could be held liable, to the same ratio as the extent of the damage done during the period worked for that employer bore to the total disability. It was acknowledged that, absent such a provision, a "last employer" would be liable for the full amount recoverable, even if the length of employemnt was so slight that, medically, the injury would, in all prob-

> ability, not be attributable to that "last employment".[1] Nevertheless, the Congress evidently declined to adopt the suggestion thus proffered; and it would seem a fair inference that the failure to amend was based upon a realization of the difficulties and delays which would inhere in the administration of the Act, were such a provision incorporated into it. Thus we conclude that the Congress intended that the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

From this premise the court below correctly arrived at the conclusion that the statutory provisions permitting the employer immunity in cases where the employer secured proper and sufficient insurance, should be operative in like manner. Precisely as distribution of the primary liability for the payment of the award by *successive employers* was rejected by the Congress, so the court found that distribution of the secondary liability of insurance carriers among *successive insurers* should be rejected. In so doing the provisions of the statute imposing liability and providing security for the payment thereof, are brought into harmonious consistency.

The State Insurance Fund seeks to break this established consistency and in its place provide for a different rule of liability in favor of successive insurance carriers from that which the Congress expressly rejected in the case of successive employers. It requires no extensive argument that if such distinction between the liabilities of successive

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[1] "Hearing of Committee on the Judiciary of the House of Representatives, on H.R."

employers and successive carriers should be brought into existence, it is for the Congress to do so by appropriate amendment of the statute. That this court has always refused to legislate is firmly established.

It follows, therefore, that the argument made by the State Insurance Fund, the last carrier herein, for a modification of the Longshoremen's and Harbor Worker's Compensation Act and the adjustment of its policy coverage accordingly is fallacious and the petition for the issuance of a certiorari, based thereon should be rejected.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

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